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Elements of Statutory Offenses

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ELEMENTS OF STATUTORY OFFENSES

I. LARCENY

State v. Riley, 282 S.E.2d 623, (W. Va. 1981)

In *State v. Riley,*[1] the court examined the use of larceny as a lesser included offense of breaking and entering. The *Riley* decision reaffirmed the court's previous holdings[2] that permit an indictment for breaking and entering to be joined with charges of grand and petit larceny. The court also held that a person present and participating in the theft of property is chargeable with the value of all goods taken by him and his cohort(s).

The defendant was in a vehicle containing stolen property taken from a breaking and entering when it was stopped by police for a traffic violation. The theft was reported the next day and the defendant was subsequently arrested. He confessed that he was present and participated in the crime, although he maintained he had taken only a tape player. The defendant was indicted for breaking and entering and for grand larceny. At trial, he testified that he had gone into the store, but reiterated that all he had taken was the tape player, worth less than fifty dollars.[3] The defendant was convicted of grand larceny.

The supreme court affirmed the conviction, holding that the defendant was chargeable with the value of all the goods taken.[4] According to the court, it made no difference that the defendant did not help to carry off every article stolen. The court observed, "[i]n cases of theft, the value of the loot is not divided by the number of thieves in determining whether the larceny is grand."[5]

II. DELIVERY OF CONTROLLED SUBSTANCES

State v. Trogdon, 283 S.E.2d 849 (W. Va. 1981)

In *State v. Trogdon,*[6] the court held that the statute prohibiting delivery of a controlled substance does not require specific intent and, therefore, intent need not be alleged in the indictment. The opinion examined the difference in statutory requirements for possession and delivery of controlled substances and how these differences affect the sufficiency of indictments.

The defendant had appealed his conviction for delivery of a controlled substance on the grounds that his indictment was insufficient because it did not allege an intentional delivery. The court cited its recent decision in *State*

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[1] 282 S.E.2d 623 (W. Va. 1981).

[2] State v. Cutlip, 131 W. Va. 141, 46 S.E.2d 454 (1948); State v. Varner, 131 W. Va. 459, 48 S.E.2d 171 (1948).

[3] At the time of the offense a theft of more than fifty dollars constituted grand larceny. W. VA. CODE § 61-3-13 (1957) (amended 1977 to two hundred dollars or more).

[4] 282 S.E.2d at 628.

[5] *Id.* at 628 n.5 (citing Knight v. Florida, 217 So.2d 124, 125 (Fla. Dist. Ct. App. 1968)).

[6] 283 S.E.2d 849 (W. Va. 1981).

v. Underwood,[7] in which it observed that possession with the intent to manufacture and deliver a controlled substance is a separate offense from actual manufacture or delivery. In *Underwood*, the court held that the State did not have to prove possession with the intent to deliver when the charge is manufacturing or delivery.[8] The court concluded in *Trogdon* that since West Virginia Code § 60A-4-401(a) does not require specific intent, it need not be alleged in the indictment.

III. INDECENT EXPOSURE

State v. Knight, 285 S.E.2d 401 (W. Va. 1981)

The court reversed a conviction for indecent exposure in *State v. Knight*[9] and held that the indecent exposure statute[10] was not unconstitutionally vague. The opinion provided a detailed explanation of the elements of the offense.[11]

The statutory language was found to inform the defendant and the community of the acts which are punishable in plain and unambiguous terms containing all the essential elements of the offense. Meeting these requirements, the court held that the statute was not unconstitutionally vague.[12]

The court identified the three element of the indecent exposure crime: (1) that the victim did not consent; (2) that the act consists of the intentional exposure of sex organs or anus; and (3) that the act is done under circumstances known to be likely to cause affront or alarm.[13] An indictment charging this offense must include all of these elements.

In examining the defendant's indictment, the court found the first element, lack of consent, was missing. That element is not contained in the indecent exposure statute. Instead, it is required by another section of the sex crimes article.[14] The court also found the indictment insufficient since the language used was so vague that it could have been construed to allege a violation of the public indecency statute.[15]

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[7] 281 S.E.2d 491 (W. Va. 1981).

[8] The defendant was charged under W. VA. CODE § 60A-4-401(a) (1977), which reads: "(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

[9] 285 S.E.2d 401 (W. Va. 1981).

[10] W. VA. CODE § 61-8B-10 (1977).

[11] 285 S.E.2d at 401. The court in *Knight* also discussed the ethical problem raised when a prosecutor has an interest in a case under his control. The court held that a prosecutor should disqualify himself from a case when his interest in the outcome of the criminal prosecution goes beyond the normal duty to see that justice is achieved. *Id.* at 407.

[12] *Id.* at 404.

[13] *Id.*

[14] W. VA. CODE § 61-8B-2 (1977).

[15] W. VA. CODE § 61-8B-11 (1977). The indictment read in part: "Timothy Knight . . . did unlawfully and intentionally expose his sexual organs, to wit, penis, to . . . under circumstances which caused . . . affront and alarm, against the peace and dignity of the state." 285 S.E.2d at 405. W. VA. CODE § 61-8B-10 (1977) proscribes indecent exposure:

> (a) A person is guilty of indecent exposure when he intentionally exposes his sex organs or anus under circumstances in which he knows his conduct is likely to cause affront or

The court also agreed with the defendant's contention that the evidence offered at trial was insufficient to support his conviction. No evidence showing the victim's lack of consent was offered. Lack of consent would have been shown by a demonstration of forcible compulsion as defined in the sex crimes article.[16] The court, noting that each element of the offense must be proven beyond a reasonable doubt, concluded that the absence of evidence showing lack of consent required that the conviction be set aside.[17]

IV. ROBBERY

State v. Harless, 285 S.E.2d 461 (W. Va. 1981)
State v. Ferguson, 285 S.E.2d 448 (W. Va. 1981)

In *State v. Harless,*[18] the court discussed at length the proper classifications of robbery under the current statutory scheme. The court found that robbery should be categorized as "aggravated" and "nonaggravated," and provided what it considered appropriate instructions to the jury for each.

The defendant was convicted of armed robbery and sentenced to the penitentiary for ten years. The victim had been knocked to the ground in the process of having her purse taken from her. No weapon was used in the crime.

The court traced the development of the crime of robbery from common law to its present statutory form.[19] The statute distinguishes between robbery attempted or accomplished by the use of a dangerous weapon and other forms of robbery or attempted robbery. The distinction is properly characterized with the terms "aggravated" and "nonaggravated," according to the court. But, the court recognized the term "armed" is frequently used in place of "aggravated" and refused to consider the use of the term "armed" reversible error.[20]

The court acknowledged in *Harless* that the instruction approved for use in *State v. Davis*[21] for armed (aggravated) robbery would result in reversible error if used in certain circumstances. The instruction described armed robbery as being accomplished "by force and violence or by putting the victim in

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alarm.

W. VA. CODE § 61-8B-11 (1977) proscribes public indecency:

(a) A person is guilty of public indecency when, knowing his conduct is likely to be observed by others who would be affronted or alarmed:

* * *

(2) He intentionally exposes the private or intimate parts of his body or the body of another person.

[16] W. VA. CODE § 61-8B-1 (1977), which defines forcible compulsion generally as:

(a) Physical force that overcomes such earnest resistance that as might reasonably be expected under the circumstances; or

(b) Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped.

[17] 285 S.E.2d at 406.

[18] 285 S.E.2d 461 (W. Va. 1981).

[19] W. VA. CODE § 61-2-12 (1977).

[20] 285 S.E.2d at 465.

[21] 153 W. Va. 742, 172 S.E.2d 569 (1970).

fear."[22] Using this instruction, a jury could convict for armed (aggravated) robbery when it found the victim was placed in fear without the use of a dangerous weapon or violence. The court also noted that use of the instruction in cases where there is a substantial conflict as to whether violence or a dangerous weapon was used would also be reversible error. Use of the *Davis* instruction was limited by the court to cases where the evidence is clear that violence or a dangerous weapon is used.[23] Since the facts in *Harless* fit within this limitation, the court affirmed the defendant's conviction.

Harless also provided model instructions for cases involving aggravated or nonaggravated robbery.[24] The rapid acceptance and use of these instructions will alleviate the potential problems posed by the *Davis* instructions.

In *State v. Ferguson*,[25] the court overturned an armed robbery conviction for lack of proof. The court found that no evidence was offered at trial to show that the defendant intended to deprive the victim of property. This intent, according to the court, is an essential element of any robbery.

The defendant and a female companion were hitchhiking when the victim picked them up. As the female got out of the vehicle behind the defendant, she grabbed a purse belonging to the victim's wife from the seat. The victim pursued the girl and struggled with her to recover the purse. The defendant had started to walk away after exiting the victim's truck, but returned to aid the girl. The defendant claimed he was under the impression that the victim was attacking the girl. The defendant and victim struggled as the female escaped. When the victim protested to the defendant about the theft of the purse, the defendant told the victim that he would get the purse back. Several days later, the defendant led a third party to the purse.

The court discussed the *Harless* decision and the classifications of robbery. According to the court, the defendant was too far removed from the violence between the girl and the victim to be considered a party to it. Additionally, the court noted that the victim testified that he was in no fear of the defendant until after the entire incident was over.[26]

The court reversed the convictions and ordered the defendant discharged. The court noted that the State's evidence tended to support the defendant's lack of intent and thus the verdict was unsupported by the evidence.[27]

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[22] *Id.* at 757, 172 S.E.2d at 578.
[23] 285 S.E.2d at 466.
[24] *Id.* at 465 nn.7-8.
[25] 285 S.E.2d 448 (W. Va. 1981).
[26] *Id.* at 450.
[27] *Id.*